Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE THETUS A. KNOX, T. MICHAEL MARTIN And WANDA WALLACE

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

(Amended)

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QUESTION PRESENTED

1. Whether petitioner appealed to the Eleventh Circuit Court of Appeals within the time provided by FRAP 4(a)(4)(1)(A)(iv).

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Leishman v. Associated Wholesale Elec. Co.

318 U.S. 203 (1943) 3,4

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FRCP 59(e) 1,3.4

OPINION BELOW

The Eleventh Circuit Court of Appeals' dismissal decision is found in Appendix B.

JURISDICTION

The Eleventh Circuit filed its dismissal decision on September 22, 2009 and the order denying a rehearing on November 17, 2009. The Petition for Writ of Certiorari was timely filed by expressed mail on November 27, 2009. On or about January 5, 2010, petitioner received a notice to correct his Petition for Writ of Certiorari by March 6, 2010. This Amended Petition for Writ of Certiorari is timely filed by expressed overnight mail on March 5, 2010. This Court has jurisdiction over this Petition pursuant to 28 U.S.C Section 1254(1).

PROCEDURAL RULES INVOLVED

FRAP 4(a)(4)(1)(A)(iv)

"If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: . . . (iv) to alter or amend the judgment under [FRCP] Rule 59."

FRCP 59(e)

"A motion to alter or amend the judgment shall be served not later than 10 days of the judgment."

STATEMENT OF CASE

On March 23, 2009, the district court electronically entered a final sanctions order and notice of entry was e-mailed to petitioner's attorney pursuant to the local rules. On March 24, 2009, the district court electronically entered the sanctions judgment and notice of entry was e-mailed to petitioner's attorney pursuant to the local rules. On April 2, 2009, petitioner timely filed his Motion for Reconsideration of the sanctions judgment and amended the motion on or about April 3, 2009. On May 26, 2009, the district court electronically entered an order denying petitioner's motion for reconsideration as amended and e-mailed notice of the entry to petitioner's attorney pursuant to the local rules. On June 5, 2009, petitioner filed his motion for reconsideration of the May 26, 2009 order. On or about June 10, 2009, petitioner filed an amended motion for reconsideration. On July 15, 2009, the district court electronically entered an order denying petitioner's second notice of appeal and e-mailed the entry notice to petitioner's attorney pursuant to the local rules.

On August 12, 2009, petitioner filed a timely Notice of Appeal of the July 15, 2009 second reconsideration order, May 26, 2009 first reconsideration order, March 24, 2009 sanctions judgment, March 23, 2009 sanctions order and the sanctions portion of the March 29, 2007 summary judgment order. On September 22, 2009, the Eleventh Circuit entered an order dismissing petitioner's appeal, stating the "appeal filed on August 12, 2009, is untimely to contest the district court's March 24, 2009 final judgment." Petitioner filed a timely motion for rehearing. On November 17, 2009, the Eleventh Circuit denied the motion for rehearing.

On November 27, 2009, petitioner timely filed a Petition for Writ of Certiorari. On or about January 5, 2010, the Court requested that appellant correct his Petition by March 6, 2010. Petitioner now files this his corrected Petition.

REASONS FOR GRANTING THE PETITION

1. Certiorari Should Be Granted To Consider The Important Procedural Question Of Whether Petitioner Appealed To The Eleventh Circuit Court Of Appeals Within The Time Provided By FRAP 4(a)(4)(1)(A)(iv).

FRAP 4(a)(4)(1)(A)(iv) provided as follows: "If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
. . . (iv) to alter or amend the judgment under Rule 59."
Rule 59(e) of the Federal Rules of Civil Procedure provides: "A motion to alter or amend the judgment shall be served not later than 10 days of the judgment." Id. In ***Leishman v. Associated Wholesale Electric Co., 318 U.S. 203 (1943),*** this Court granted a petition for writ of certiorari to decide an important question of practice presented under the Rules of Civil Procedure similar to the one presented in this Petition: Whether
"petitioner appealed to the Circuit Court of Appeals within the time provided by law." Id.

In ***Leishman,*** the district court entered an order dismissing the civil complaint. Id. The petitioner filed a motion under Rule 52(b) asking that the findings 'be amended and supplemented." Id. at 204. The district court denied the motion on June 9, 1941. Id. The petitioner filed a notice of appeal on September 4, 1941. Id. "The Circuit Court of Appeals sua sponte held it had no jurisdiction

because the appeal was taken more than three months after entry of judgment." Id. In so holding, the appellate court recognized the general rule that "where a petition for rehearing, motion for new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." Id at 205. The appellate court distinquished ***Leishman*** from the general rule on the ground that the petitioner's motion was not one to amend the judgment but merely one to amend and supplement the findings and conclusion. Id.

In the present appeal the Eleventh Circuit dismissed, sua sponte, petitioner's appeal on the ground that an "appeal filed on August 12, 2009 is untimely to contest the district court's March 24, 2009 judgment." (Appendix "B" Eleventh Circuit's decision, p. 1). Petitioner maintains that the Eleventh Circuit's decision is contrary to the general procedural rule this Court recognized in ***Leishman*** and is found in FRAP 4(a)(4)(1)(A)(iv).

FRAP 4(a)(4)(1)(A)(iv) provided the following procedural rule the Eleventh Circuit was required to follow: "If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
. . . (iv) to alter or amend the judgment under Rule 59." Id. FRCP 59(e) provided: "A motion to alter or amend the judgment shall be served not later than 10 days of the judgment."

In the present case the final sanctions judgment was electronically entered on March 24, 2010. (Appendix "F") Within ten (10) days of the entry of the judgment, petitioner filed his motion for reconsideration of the judgment pursuant to FRCP 59(e). On May 26, 2009, the

order denying the motion for reconsideration was electronically entered. (Appendix "E") (This order also had a manually filed date for May 22, 2009.) The e-mailed notice to petitioner's attorney stated the order was entered on May 26, 2009. On June 5, 2009, petitioner filed a motion for reconsideration of the order entered on May 26, 2009 and alleged the local e-file notification rules were unconstitutionally vague pursuant to 59(e). (Appendix "D", Order, p. 5) Again, the reconsideration motion was filed within ten (10) days of the final order. On July 15, 2005, the district court electronically entered an order denying the second motion for reconsideration. Id.

On August 12, 2009 and within thirty days of the entry of the order disposing of the last Rule 59 motion, petitioner filed a timely Notice of Appeal of the sanctions portion of the March 29, 2007 summary judgment order, March 23, 2009 sanctions order, March 24, 2009 sanctions judgment, May 26, 2009 reconsideration order and July 15, 2009 second reconsideration order.

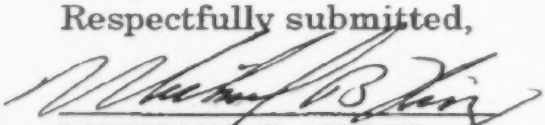
Petitioner maintains that his appeal to the Eleventh Circuit Court of Appeals was within the time provided by law and the appeals court had jurisdiction over his appeal. The appeals court erroneously dismissed the appeal as being untimely. To the extent, the Eleventh Circuit held that the appeal was not timely, petitioner maintains that FRAP 4(a)(4)(1)(A)(iv) was unconstitutionally vague on its face and deprived him of his rights to prosecute his appeal and have the sanctions award in the amount of $30,955.00 reversed.

CONCLUSION

Petitioner urges the court to review the important procedural issue raised herein and reverse the dismissal decision of the Eleventh Circuit Court of Appeals and the district court's judgment and reconsideration orders.

This 5th day of March, 2010.

Respectfully submitted,



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Appendix A

ELEVENTH CIRCUIT ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14159-J

PHILLIP R. NEELY,

Petitioner,

Versus

CITY OF RIVERDALE, IRIS JESSIE, individually and in her official capacity as city manager,
THETUS A. KNOX, individually and in her official capacity as city police chief,
T. MICHAEL MARTIN, individually and in his official capacity as city hearing officer,
WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before TJOFLAT, HULL, and PRYOR, Circuit Judges.

BY THE COURT:

Appellant's September 29, 2009, motion for reconsideration of our September 22, 2009, order dismissing this appeal for lack of jurisdiction, is DENIED.

Appendix B

ELEVENTH CIRCUIT DISMISSAL ORDER

B1

[Do Not Publish]

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15159-J

PHILLIP R. NEELY,

Plantiff-Appellant,

Versus

CITY OF RIVERDALE,
IRIS JESSIE, individually and in her official capacity as city manager,
THETUS A. KNOX, individually and in her official capacity as city police chief,
T. MICHAEL MARTIN, individually and in his official capacity as city hearing officer, WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants-Appellees.

Appeal from the United States District Court for the

Northern District of Georgia

B2

Before TJOFLAT, HULL and PRYOR, Circuit Judges,

BY THE COURT

This appeal is DISMISSED, sua sponte, for lack of jurisdiction. Phillip R. Neely's notice of appeal, filed on August 12, 2009, is untimely to contest the district court's March 24, 2009 final judgment. See Fed. R. App. P. 4(a)(1)(A),4(a)(4); Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001); Wright v. Preferred Research, Inc., 891 F.2d 886, 889-90 (11th Cir. 1990).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir. R. 40-4 and all other applicable rules.

Appendix C

DISTRICT COURT ORDER DENYING MOTION FOR RECONSIDERATION OF THE ORDER DENYING TUE MOTION TO STAY PAYMENT OF SANCTIONS

C1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY,

Plaintiff, CIVIL ACTION

Vs. NO. 1:O5-cv-1930-GET

CITY OF RIVERDALE; IRIS JESSIE, individually and in her official capacity;
THETUSA. KNOX, individually and in her official capacity as city police chief;
T. MICHAEL MARTIN, individually and in his official capacity as hearing officer;
WANDA WALLAC individually and j her official capacity as city councilwoman,
Defendants.

ORDER

The above—styled ma is presently before the court on plaintiff's motion for reconsideration [docket no. 172]

On July 25, 2005, plaintiff filed this action against defendants alleging discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 19B3, 42 U.S.C. § 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, at seq., and the First and Fourteenth Amendments to the United States Constitution. On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005

the Magistrate Judge issued a Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendants' motion to dismiss "for improper service, for failure to receive and attach an EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individual-named Defendants as improper parties" be denied without prejudice. The Magistrate Judge also recommended granting defendants' motion to dismiss as to "Plaintiff's first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintiff filed an objection as to the dismissal of his third and fourth EEOC charges only. On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaintiff's first and second EEOC charges and denied defendants' motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges.

On March 29, 2007, the court issued an order adopting the Magistrate Judge's R & R granting defendants' motion for summary judgment and granting defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions. The court remanded the action to the Magistrate Judge for a hearing on the sanction award.

On April 19, 2007, plaintiff filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. On April 26, 2007, the Magistrate Judge issued an order setting the hearing to determine appropriate sanctions for May 15, 2007. At the May 15 hearing, the Magistrate Judge directed plaintiff to file a responsive pleading within ten days outlining plaintiff and plaintiff's counsel's ability to pay the amount of sanctions requested by defendants. On May 24, 2007, plaintiff filed an amended notice of appeal to include the order on the motion for sanctions.

On May 30, 2007, plaintiff filed a motion to stay sanctions and costs proceedings pending the appeal. On July 3, 2007, the Eleventh Circuit dismissed the amended notice of appeal for lack of jurisdiction. On February 14, 2008, the Eleventh Circuit affirmed the March 29, 2007 decision of this court.

On April 25, 2008, the Magistrate Judge issued an order setting the hearing regarding sanctions on May 14, 2008. The May 14 hearing was not held because plaintiff's counsel appeared without plaintiff and informed the Magistrate Judge that counsel was filing an appeal with the United States Supreme Court. On October 16, 2008, the Eleventh Circuit issued a notice that the petition for a writ of certiorari was denied by the Supreme Court.

On January 15, 2009, the Magistrate Judge held a hearing for the purpose of allowing plaintiff to provide evidence of his ability to pay any sanctions imposed by the court. Plaintiff, however, failed to appear. On February 27, 2009, the Magistrate Judge issued an R & R imposing sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. No objections were filed to the R & R.

On March 23, 2009, this court issued an order adopting as unopposed the Magistrate Judge's R & R imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. On April 2, 2009, plaintiff filed a motion to reconsider and vacate final judgment, contending that plaintiff's counsel was not properly served with the R & R. Defendants responded to the motion, arguing that plaintiff's motion was untimely and noting that plaintiff had never complained about the non-receipt of pleadings before this instance. Plaintiff did not file a reply in support of the motion.

On May 22, 2039, this court issued an order denying plaintiff's motion for reconsideration. In doing so, the court noted that it had reviewed the service certificates for the electronic filing system and confirmed that the notice of electronic filing for the

Magistrate Judge's R & R was served on plaintiff's counsel in the same manner and at the same address as all other pleadings in this case, including the judgment which plaintiff admits was received. On July 15, 2009, this court issued an order denying plaintiff's motion for reconsideration and motion to vacate the first reconsideration order, final judgment, sanction.

On January 15, 2009, the Magistrate Judge held a hearing for the purpose of allowing plaintiff to provide evidence of his ability to pay any sanctions imposed by the court. Plaintiff, however, failed to appear. On February 27, 2009, the Magistrate Judge issued an R & R imposing sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. No objections were filed to the R & R.

On March 23, 2009, this court issued an order adopting as unopposed the Magistrate Judge's R & R imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. On April 2, 2009, plaintiff filed a motion to reconsider and vacate final judgment, contending that plaintiff's counsel was not properly served with the R & R. Defendants responded to the motion, arguing that plaintiff's motion was untimely and noting that plaintiff had never complained about the non-receipt of pleadings before this instance. Plaintiff did not file a reply in support of the motion.

On May 22, 2039, this court issued an order denying plaintiff's motion for reconsideration. In doing so, the court noted that it had reviewed the service certificates for the electronic filing system and confirmed that the notice of electronic filing for the Magistrate Judge's R & R was served on plaintiff's counsel in the same manner and at the same address as all other pleadings in this case, including the judgment which plaintiff admits was received. On July 15, 2009, this court issued an order denying plaintiff's motion for reconsideration and motion to vacate the first reconsideration order, final judgment, sanction order and

R & R as well as the amended motion or reconsideration and motion to vacate.

On July 27,2009, plaintiff filed a motion to stay payments of sanctions and costs pending appeal of sanction judgments. On July 29, 2009, defendants filed a motion for a supersedeas bond should a stay be granted. On August 11, 2009, plaintiff amended the motion to stay pending appeal to include a request that the stay be granted without a suporsedoas bond.

On August 12, 2009, plaintiff filed a notice of appeal from the sanctions portion of the March 29 2008 order, the March 23, 2009 sanctions order, the March 24, 2009 sanctions judgment, the May 26, 2009 order denying plaintiff's motion for reconsideration and the July 14, 2009 order denying plaintiff's second motion for reconsideration. On or about September 23, 2009, the Eleventh Circuit issued an order dismissing plaintiff's appeal for lack of jurisdiction on the grounds that the August 12, 2009 notice of appeal was untimely. On September 29, 2009, this court issued an order, *inter alia*, denying as moot plaintiff's motion to stay payment of sanctions and costs pending appeal [docket no. 157] and plaintiff' s motion to stay [docket no. 161]

Plaintiff now moves for reconsideration of the court's September 29, 2009 order. Having considered said motion, plaintiff's motion for reconsideration [docket no. 172] is **DENIED**.

Summary

Plaintiff's motion for reconsideration [docket no. 172] is **DENIED**.

SO ORDERED, this 10 day of November, 2009.

C. ERNEST TIDWFTL, JUDGE
UNITED STATES DISTRICT JUDGE

Appendix D

DISTRICT COURT ORDER DENYING SECOND MOTION FOR RECONSIDERATION OF THE ORDER DENYING THE MOTION FOR RECONSIDERATION

D1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY,

Plaintiff,

vs.

CIVIL ACTION FILE

No. 1:05-cv-1930-GET

CITY OF RIVERDALE;
IRIS JESSIE, individually and in her official capacity;
THETUS A. KNOX, individually and in her official capacity as city police chief; T. MICHAEL MARTIN, individually and in his official capacity as hearing officer; WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants.

ORDER

The above-styled matter is presented before the court on: (1) plaintiff's motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 153]; (2) plaintiff's amended motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 155].

On July 25, 2005, plaintiff filed this action against defendants alleging discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 05.C. § 1983, 42 U.S.C.

§ 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the First and Fourteenth Amendments to the United States Constitution, On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005, the Magistrate Judge issued a Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendants' motion to dismiss "for improper service, for failure to receive and attach an EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individually-named Defendants as improper parties" be denied without prejudice. The Magistrate Judge also recommended granting defendant's motion to dismiss as to "Plaintiff's first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintiff filed an objection as to the dismissal of his third and fourth EEOC charges only. On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaintiff's first and second EEOC charges and denied defendants' motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges.

On March 29, 2007, the court issued an order adopting the Magistrate Judge's R & R granting defendant's notion for summary judgment and granting defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions. The court remanded the action to the Magistrate Judge for a hearing on the sanction award.

On April 19, 2007, plaintiff filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. On April 26, 2007, the Magistrate Judge issued an order setting the hearing to determine appropriate sanctions for May 15, 2007. At the May 15 hearing, the Magistrate Judge directed plaintiff to file a responsive pleading within ten days outlining plaintiff and plaintiff's counsel's ability to pay the amount of sanctions

requested by defendant. On May 24, 2007, plaintiff filed an amended notice of appeal to include the order on the motion for sanctions.

On May 30, 2007, plaintiff filed a motion to stay sanctions and costs proceedings pending the appeal. On July 3, 2007, the Eleventh Circuit dismissed the amended notice of appeal for lack of jurisdiction. On February 14, 2008, the Eleventh Circuit affirmed the March 29, 2007 decision of this court.

On April 25, 2008, the Magistrate Judge issued an order setting the hearing regarding sanctions on May 14, 2008. The May 14 hearing was not held because plaintiff's counsel appeared without plaintiff and informed the Magistrate Judge that counsel was filing an appeal with the United States Supreme Court. On

October 16, 2008, the Eleventh Circuit issued a notice that the petition for a writ of certiorari was denied by the Supreme Court.

On January 15, 2009, the Magistrate Judge held a hearing for the purpose of allowing plaintiff to provide evidence of his ability to pay any sanctions imposed by the court. Plaintiff, however, failed to appear. On February 27, 2009, the Magistrate Judge issued an R & R imposing sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. No objections were filed to the R & R.

On March 23, 2009, this court issued an order adopting as unopposed the Magistrate Judge's R & R imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00. On April 2, 2009, plaintiff filed a notion to reconsider and vacate final judgment, contending that plaintiff's counsel was not properly served with the H & R. Defendants responded to the motion, arguing that plaintiffs motion was untimely and noting that plaintiff had never complained about the non-receipt of pleadings before this instance. Plaintiff did not file a reply in support of the motion.

On May 22, 2009, this court issued an order denying plaintiff's motion for reconsideration. In doing so, the court noted that it

had reviewed the service certificates for the electronic filing system and confirmed that the notice of electronic filing for the Magistrate Judge's R & R was served on plaintiff's counsel in the same manner and at the same address as all other pleadings In this case, including the judgment which plaintiff admits was received.

On June 5, 2009, plaintiff filed a motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and R & R contending that Federal Rule Civil Procedure 11, 28 U.S.C. 636(c) and the court's local e-file notification rules "are unconstitutionally vague and deprived counsel of legal notice of the prohibited conduct and the magistrate [judge]'s report and recommendations." This motion for reconsideration and the accompanying affidavit are basically restatements of plaintiff's first motion for reconsideration of the judgment. Plaintiff's counsel, however, further contends that he "has been informed by his e-mail provider, Google, that no e-mail was sent from this court to counsel's court-registered e-mail address, ..., on or about February 27, 2009," Plaintiff's counsel requests that this court all other pleadings In this case, including the judgment which plaintiff admits was received.

On June 5, 2009, o filed a motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and R & R contending that Federal Rule Civil Procedure 11, 28 U.S.C. 636(c) and the court's local e-file notification rules "are unconstitutionally vague and deprived counsel of legal notice of the prohibited conduct and the magistrate [judge]'s report and recommendations." This motion for reconsideration and the accompanying affidavit are basically restatements of plaintiff's first motion for reconsideration of the judgment. Plaintiff's counsel, however, further contends that he "has been informed by his e-mail provider, Google, that no e-mail was sent from this court to counsel's court-registered e-mail address,...., on or about February 27, 2009," Plaintiff's counsel requests that this court enter an order directing Google to produce all court email

transactions for his email address for the relevant time period. Plaintiff also requests an evidentiary hearing "so he can tender testimony of witnesses (magistrate, e-file court administrator and Google representative) and court e-mail transactions occurring on or about February 27, 2009 to support his contention that the court did not email him notification of the magistrate's report and recommendation." Alternatively, plaintiff requests that the court enter an order directing Google to produce all court email transactions for his email address for the relevant time period. Plaintiff also requests an evidentiary hearing "so he can tender testimony of witnesses (magistrate, e-file court administrator and Google representative) and court e-mail transactions occurring on or about February 27, 2009 to support his contention that the court did not email him notification of the magistrate's report and recommendation." Alternatively, plaintiff requests that the court "consider and rule on his lack of notice and constitutional issues before they are presented for review by the appellate court."

Although plaintiff does not include any correspondence from Google, counsel states that Google has informed him that it requires a court order before it can provide information regarding e-mail transactions. Plaintiff's exhibit to the motion, however, does include a screen shot c counsel's inbox purporting to be all e-mails received from the court for the time in question.

A motion for reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movant. LR 7.2E, NDGa. Such a motion may not be *employed as a vehicle to tender new legal theories or to introduce new evidence that could have been presented in conjunction with the previously filed motion or response.* Rather, motions for reconsideration serve the limited purpose of correcting manifest errors of law or fact, or in certain instances, calling newly discovered evidence to the court's attention. Thus, the court is willing to reconsider a prior ruling on an issue in the face of new mandatory authority.

Plaintiff's motion for reconsideration presents no new evidence to the court that could not have boon presented earlier. Furthermore, despite counsel's representations about Google, the court finds that the information plaintiff's counsel contends would be provided by his e-mail provider would be only marginally helpful to his cause. Likewise, little would be gained by holding an evidentiary hearing requiring various court personnel to testify. The court is satisfied that the CN/ECF service certificate is accurate, particularly when viewed with the service certificates of other pleadings that plaintiff's counsel admits were received without incident. Furthermore, the court has consulted the System/Database Administrator for this court and confirmed that the court mail server records indicate that the talkamerica.net mail server associated with plaintiff's counsel's address of record responded to the court's emails with a notice that the email notifications related to the documents in quest were received by talkamerica.net.

Finally, although plaintiff states that "the appellate court requires that this court consider and rule on his lack of notice and constitutional issues before they are presented for review by the appellate court," plaintiff's motion makes only a cursory assertion of such claims, without citation or legal argument. To the extent a specific ruling is required; however, the court finds that adequate notice was sent to plaintiff through plaintiff's counsel in a manner that does not implicate any constitutional issues.

Therefore, for all the foregoing reasons, plaintiff's motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 153] and plaintiff's amended motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 155] are DENIED.

Summary

(1) Plaintiff's motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 153] is **DENIED**.

(2) Plaintiff's amended motion to reconsider and vacate the first reconsideration order, final judgment, sanction order and Magistrate Judge's Report and Recommendation [docket no. 155] is **DENIED**.

SO ORDERED, this 15th day of July, 2009.

G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT JUDGE

Appendix E

DISTRICT COURT ORDER DENYING MOTION FOR RECONSIDERATION OF THE SANCTION ORDER AND JUDGMENT

E1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY,

Plaintiff,

vs.

CIVIL ACTION FILE
No. 1:05-dv-1930-GET

CITY OF RIVERDALE; IRIS JESSIE, individually and in her official capacity; THETUS A. KNOX, individually and in her official capacity as city police chief; T. MICHAEL NIARTIN, individually and in his official capacity as hearing officer; WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants.

ORDER

The above—styled matter is presently before the court on: (1) plaintiff's notion to rcconsider and vacate the final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 148]; (2) plaintiff's amended motion to reconstder and vacate the final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 149].

On July 25, 2005, plaintiff filed this action against defendants alleqing discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, at seq., and the First and

Fourteenth Amendments to the United States Constitution. On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005, the Magistrate Judge issued a Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendant's motion to dismiss "for improper service, for failure to receive and attach an EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individually-named Defendants as improper parties" be denied without prejudice.

The Magistrate Judge also recommended granting defendant's motion to dismiss as to "Plaintiff's first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintiff filed an objection as to the dismissal of his third and fourth EEOC charges only, On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaintiff's first and second EEOC charges and denied defendant's motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges.

On March 29, 2007, the court issued an order adopting the Magistrate Judge's R & R granting defendant's motion for summary judgment and granting defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions. The court remanded the action to the Magistrate Judge for a hearing on the sanction award.

On April 19, 2007, plaintiff filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. On April 26, 2007, the Magistrate Judge issued an order setting the hearing to determine appropriate sanctions for May 15, 2007. At the May 15 hearing, the Magistrate Judge directed plaintiff to file a responsive pleading within ten days outlining plaintiff and plaintiff's counsel's ability to pay the amount of sanctions requested by defendant. On May 24, 2007, plaintiff filed an amended notice of appeal to include the order on the motion for sanctions.

On May 30, 2007, plaintiff filed a motion to stay sanctions and costs proceedings pending the appeal. On July 3, 2007, the Eleventh Circuit dismissed the amended notice of appeal for lack of jurisdiction On February 14, 2008; the Eleventh Circuit affirmed the March 29, 2007 decision of this court.

On April 25, 2008, the Magistrate Judge issued an order setting the hearing regarding sanctions on May 14, 2008. The May 14 hearing was not held because plaintiff's counsel appeared without plaintiff and informed the Magistrate Judge that counsel was filing an appeal with the United States Supreme Court.

October 16, 2008 the Eleventh Circuit issued a notice that the petition for a writ of certiorari was denied by the Supreme Court.

On January 15, 2809, the Magistrate Judge held a hearing for the purpose of allowing plaintiff to provide evidence of his ability to pay any sanctions imposed by the court. Plaintiff, however, failed to appear. On February 27, 2009, the Magistrate Judge issued an R & R imposing sanctions solely against plaintiff's counsel Michael Bernard King, in the amount of $30,955.00.

On March 23, 2009, this court issued an order adopting as unopposed the Magistrate Judge's R & R imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,953.00. On April 2, 2009, plaintiff filed a motion to reconsider and vacate final judgment, contending that plaintiff's counsel was not properly served with the R & R Defendants responded to the motion, arguing that plaintiff's motion was untimely and noting that plaintiff had never complained about the non-receipt of pleadings before this instance. Plaintiff did not file a reply in support of the motion.

The court has reviewed the service certificates for the electronic filing system and has confirmed that the notice of electronic filing for the Magistrate Judge's R & R was served on plaintiff's counsel in the same manner and at the same address as all other pleadings in this case, including the judgment which

plaintiff admits was received, while plaintiff's counsel submitted an affidavit stating that no e-mail notice "was sent to plaintiff's counsel," at best, plaintiff's counsel could only attest to what was received by counsel, not what was sent by the court. The court finds that plaintiff has failed to sufficiently establish that there was anything improper about the service of the R & R. Likewise; plaintiff fails to point the court to any evidence which would explain why this one particular document, sent to the same address as all of the other documents in the case, was not received by plaintiff. Therefore, having considered the arguments of the parties, the court **ADHERES** to the rifling set forth in its March 23, 2009 Order. Plaintiff's motion to reconsider and vacate The final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 1481 and Amended motion to reconsider and vacate the final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 149] are **DENIED**.

Summary

(1) Plaintiff's motion to reconsider and vacate the final judgment, sanction order and Magistrate Judge's Report and Recommendation [no. 148] is **DENIED**.

(2) Plaintiff's amended motion to reconsider and vacate the final judgment, sanction order and Magistrate Judge's Report and Recommendation [docket no. 149] is **DENIED**.

SO ORDERED, this 22nd day of May, 2009.

_____

G. ERNEST TIDWELL, JUDGE

UNITED STATES DISTRICT JUDGE

Appendix F

DISTRICT COURT SANCTION JUDGEMENT

F1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY,

Plaintiff,

vs.

CIVIL ACTION FILE
NO. 1:05-cv-1 930-GET

CITY OF RIVERDALE, IRIS JESSIE, individually and in her official capacity as city manager, THETUS A. KNOX, individually and in her official capacity as city police chief, T. MICHAEL MARTIN, individually and in his official capacity as city hearing officer, WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of Magistrate Judge's Report and Recommendation as to Defendants' Motion [Sanctions, and the court having **ADOPTED AS UNOPPOSED** said recommendation and **GRANTED** said motion, it is

Ordered and Adjudged that Rule 11 sanctions be imposed solely against plaintiffs counsel, Michael Bernard King, in the amount of $30,955.

Dated at Atlanta, Georgia this 24th day of March, 2009.

JAMES N. HATTEN
CLERK OF COURT
By: s/Sheila Gonzalez
Deputy Clerk

Prepared, filed, and entered
in the Clerk's Office
March 24, 2009
James N. Flatten
Clerk of Court

By: s/ Sheila Gonzalez

Deputy Clerk

Appendix G

DISTRICT COURT SECOND SANCTION ORDER

G1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY

Plaintiff,

vs.

CIVIL ACTION FILE

No. 1:05-cv-1930-GET

CITY OF RIVERDALE; IRIS JESSIE, individually and in her official capacity; THETOSA. KNOX, individually and in her official capacity as city police chief;
T. MICHAEL MARTIN, individually and in his official capacity as hearing officer; WANDA WALTIACE, individually and in her official capacity as city councilwoman,

Defendants.

ORDER

The above-styled matter is presently before the court on: (1) Magistrate Judge's Report and Recommendation [docket no. 145] imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00; (2) plaintiff's motion to stay sanctions and costs proceeding pending appeal [docket no. 126] On July 25, 2005, plaintiff filed this action against defendants alleging discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, ct seq., and the First and Fourteenth Amendments to the United States Constitution. On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005, the Magistrate Judge issued a

Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendant's motion to dismiss "for improper service, for failure to receive and attach an EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individually-named Defendants as improper parties" be denied without prejudice. The Magistrate Judge also recommended granting defendant's motion to dismiss as to "Plaintiff's first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintitt filed an objection as to the dismissal of his third and fourth EEOC charges only. On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaintiff's first and second EEOC charges and denied defendant's motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges.

On March 29, 2007, the court issued an order adopting the Magistrate Judge's R & R granting defendant's motion for summary judgment and granting defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions. The court remanded the action to the Magistrate Judge for a hearing on the sanction award.

On April 19, 2007, plaintiff filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. On April 26, 2007, the Magistrate Judge issued an order setting the hearing to determine appropriate sanctions for May 15, 2007. At the May 15 hearing, the Magistrate Judge directed plaintiff to file a responsive pleading within ten days outlining plaintiff and plaintiff's counsel's ability to pay the amount 0± sanctions requested by defendant. On May 24, 2007, plaintiff filed an amended notice of appeal to include the order on the motion for sanctions.

On May 30, 2007, plaintiff filed a motion to stay sanctions and costs proceedings pending the appeal. On July 3, 2007, the Eleventh Circuit dismissed the amended notice of appeal for lack of jurisdiction. On February 14, 2000, the Eleventh Circuit affirmed the March 29, 2007 decision of this court.

On April 25, 2008, the Magistrate Judge issued an order setting the hearing regarding sanctions on May 14, 2008. The May 14 hearing was not held because plaintiff's counsel appeared without plaintiff and informed the Magistrate Judge that counsel was filing an appeal with the United States Supreme Court. On October 16, 2008, the Eleventh Circuit issued a notice that the petition for a writ of certiorari was denied by the Supreme Court.

On January 15, 2009, the Magistrate Judge held a hearing for the purpose of allowing plaintiff to provide evidence of his ability to pay any sanctions imposed by the court. Plaintiff failed to appear, however, as plaintiff's counsel apparently did not convey the court's directive regarding the hearing to his client On February 27, 2009, the Magistrate Judge issued an R & R imposing sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00.

Motion to Stay

Although it appears that no order was entered staying the sanctions and costs proceedings pending the appeal, the Magistrate Judge did not hold proceedings related to sanctions while plaintiff's appeal was pending. As all pending appeals now have been concluded, plaintiff's motion to stay sanctions and costs proceedings pending appeal [docket no. 126 is **DENIED** as moot.

Report and Recommendation

Pursuant to 28 U.S.C. § 636(b) (1), each party may file written objections, if any, to the R & R within ten (10) days of the receipt of an order. If any party serves and files written objections, the district court is required to conduct a de novo determination of those portions of the report or specified proposed findings or

recommendations to which objection is made. 28 U.S.C. § 636(b)(1)(C). No objections have been filed. Therefore, the court **ADOPTS AS UNOPPOSED** and incorporates herein as if fully set forth the Magistrate Judge's R & R imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00.

Summary

(1) Magistrate Judge's Report and Recommendation [docket no. 145] imposing Rule 11 sanctions solely against plaintiff's counsel, Michael Bernard King, in the amount of $30,955.00 is **ADOPTED AS UNOPPOSED** and incorporated herein as if fully set forth.

(2) Plaintiff's notion to stay sanctions and costs proceeding pending appeal [docket no. 126] is **DENIED** as moot.

SO ORDERED, this 23rd day of March, 2009.

G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT JUDGE

Appendix H

DISTRICT COURT SUMMARY JUDGMENT AND SANCTION ORDER

H1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELY,

Plaintiff,

vs.

CIVIL ACTION FILE

No. 1:05-cv-1930-GET

CITY OF RIVERDALE; IRIS - JESSIE, individually and in her official capacity;
THETUS A. KNOX, individually and in her official capacity as city
Police chief;
T. MICHAEL MARTIN, individually and in his official capacity as hearing officer
WANDA WALLACE, individua11y and in her official capacity as city councilwoman,

Defendants.

ORDER

The above-styled matter is presently before the court on: (1) Magistrate Judge's Report and Recommendation [docket no. 104] granting defendants' motions for summary judgment [docket no. 46, 47] and defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions [docket no. 651; (2) plaintiff's objections to the R & R [docket no- 103].

On July 25, 2005, plaintiff filed this action against defendants alleging discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commissioner. ("EEOC"), in violation of 42 U.S.C. S 1983, 42

U.S.C. § 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 u.s.c. S 2000e, etseq., and the First and Fourteenth Amendments to the United States Constitution. On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005, the Magistrate Judge issued a Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendant's motion to dismiss "for improper service, for failure to receive and attach an EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individually-named Defendants as improper parties" be denied without prejudice. The Magistrate Judge also recommended granting defendant's motion to dismiss as to TM first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintiff filed an objection as to the dismissal of his third and fourth EEOC charges only.

On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaint first and second EEOC Charges and denied defendant's motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges.

On April 10, 2006, defendants Iris Jessie, Thetus A. Knox, T. Michael Martin, and Wanda Wallace filed a motion for summary judgment. Defendant City of Riverdale filed a separate motion for summary judgment that same day. On June 1, 2006, defendants

Jessie, Martin and Wallace filed a motion for sanctions pursuant to Fed. R. Civ. P. 11.

On February 13, 2007, the Magistrate Judge issued a Report and Recommendation ("R & R") granting defendants' motions for summary judgment. The Magistrate Judge also recommends granting defendants' motion for Rule 11 sanctions.

Standard

Pursuant to 28 U § 636(b) (1), each party may file written objections, if any, to the R & R within ten (10) days of the receipt of an order. if any party serves and files written objections, the district court is required to conduct a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. 28 0.5.0. § 636 (1) (C). If no objections are filed, the R & R may be adopted as the opinion and order: of the Distrtct Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay 714 F.2d 1093 (11th Cir. 1983), cert. denied 464 U.S. 1050, 104 S. Ct. 729 (1984).

Discussion

Plaintiff asserts several objections to the Magistrate Judge's R & R. The court will address each objection in turn.

Objective No. 1

The Magistrate Judge erroneously concluded that retaliation and discrimination claims, which were purportedly released by plaintiff on November 2, 2004 and occurred before the release date, were barred.

It is undisputed that, on November 2, 2004, plaintitf executed a General Release and indemnity Agreement ("Release") in exchange for $95,000.00 in settlement of his claims against the City, its officials and employees. The Release states that plaintiff acknowledges releasing "all legal and equitable claims of every kind and nature. . .which [plaintiff] may now have or which may hereafter accrue on account of or resultinq from his claims included or that could have been included" in his then-pending EEOC charges.

The Magistrate Judge's R & R noted that the court already has dismissed plaintiff's claims arising out of EEOC Charges 2014 and 3114. The Magistrate Judge further found that plaintiff's

claims resting on adverse actions predating the Release are subject to summary judgment, as follows:

(1) Demoting plaintiff to sergeant for one day on March 12, 2004
(2) Suspending plaintif for one day on March 12, 23U4;
(3) Placing plaintiff on paid administrative leave from February 2004 to May 2334;
(4) Terminating plaintiff on 4ay 12, 2004;
(5) Suspending plaintiff for three uays on July 2, 2C04, by order of Defendant Martin;
(6) Failing to promote plaintiff to police chief on September 27, 2004; and
(7) Being told "I will get you" by defendant Jessie.

Plaintiff now argues that the Release was null and void under Georgia law because it did not contain certain statutory language. Therefore, according to plaintiff, the Magistrate Judge should not have found that he was barred from bringing those claims. Plaintiff also states that this court's November 14, 2003 order "erroneously concluded" that plaintiff's retaliation arid discrimination clams predating the Release barred.

The court finds that plaintiff fails to point the court to evidence sufficient to create a question of fact as to whether the Release was subject to the statutory language cited by plaintiff and, therefore, null and void. This is especially true in light of plaintiff's admission that he executed the Release settling his claims and the absence of any evidence. The plaintiff returned the $95,000.00 settlement proceeds. Furthermore, to the extent plaintiff is objecting to the Magistrate Judge's October 18, 2005 Non-Final R & R and this court's November 14, 2005 order dismissing plaintiff's claims, the objection is untimely.

Therefore, the Magistrate Judge correctly found that plaintiff's claims arising out of EEOC charges 2014 and 3114 and resting

on adverse actions which predate the Release are not actionable, Accordingly, plaintiff's Objection No. 1 is OVERRULED.

Objection No. 2

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient evidence to create a genuine issue of material fact concerning his failure to promote to assistant police chief retaliation claim.

The Magistrate Judge found that defendant articulated a legitimate non-discriminatory reason for denying plaintiff the promotion to assistant police chief. Specifically, defendant points to Chief Knox's letter to plaintiff informing him that because be had been suspended within the last twelve months, he was not eligible for promotion. The Magistrate Judge further found that plaintiff could not show that defendant's legitimate nondiscriminatory reason for not promoting plaintiff to assistant police chief was mere pretext.

Plaintiff, in support of Objection No. 2, cites seventeen items which he contends show that the reason given for denying the promotion to plaintiff was pretext "because (1) the reason was false; (2) Knox knew that plaintiff had not been suspended from his employment within twelve months of November 30, 2004 because there was [notice of suspension in plaintiff's personnel file for Knox to review; (3) Knox and Jessie did not comply with the personnel policy for posting the assistant police chief vacancy and (4) Knox used her false representation of plaintiff's prior suspension status to deny him the promotion to assistant chief because of his EEOC complaints and his appearance on the 'Coz' radio show and the local television news." Plaintiff's record citations, however, do not support a finding of pretext because, although the record supports a finding that plaintiff was not suspended, the evidence does not create a question of fact as to whether Chief Knox actually believed that plaintiff was ineligible for promotion because of a suspension.

The pretext analysis focuses on the employer's beliefs and perceptions of the employee's performance. See Cofield. v. Goldkist, Inc. 267 F.3d 1264, 1268 (llth Cir. 2001) - Chief Knox testified that she was informed by Major Ra Spivey that plaintiff had been suspended for three days during the preceding twelve months and that she did not independently verify this information Knox further testified that if she had reviewed plaintiff's file and had not found a document indicating the suspension, the absence of the documents would not have had any meaning to her because the City did rot "have a data base on disciplinary actions." Furthermore, there is no evidence that plaintiff attempted to correct Chief Knox's misconception about his suspension after receiving her letter. Rather, plaintiff did not complete the application process for promotion.

Therefore, in light of the foregoing, the court finds that the Magistrate Judge correctly concluded that plaintiff failed to present sufficient evidence of pretext as to plaintiff's failure to promote to assistant chief of police. Accordingly, plaintiff's Objection No. 2 is OVERRULED.

Objection No. 3

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient evidence to create a genuine issue of material fact concerning his failure to promote to captain retaliation and discrimination claims.

Defendant City moved for summary judgment on plaintiff's claim that he was discriminated against on the basis of his race arid sex and retaliated against when he was denied promotions no captain and Mashburn [white male] and Harget [white male] were promoted to captain instead. Defendant argued that plaintiff never filed or supplemented an EEOC charge on this issue arid also that plaintiff can not show that defendant's legitimate nondiscriminatory reason for promoting Capts. Mashburn and Harget are pretextual.

The Magistrate Judge found that plaintiff had rot responded to defendant's argument that he had failed to exhaust his administrative remedies The Magistrate Judge further found that none of plaintiff's EEOC charges include plaintiff's failure to promote claim nor could this claim be reasonably expected to grow out of any of his other claims. The Magistrate Judge also found that even if plaintiff had administratively exhausted this claim, plaintiff tails to show pretext.

Plaintiff objects to the findings of the Magistrate Judge arguing that (1) he was not required to exhaust his administrative remedies and (2) no reasonable person would have promoted "non-qualified Mashburn and Harget to patrol captain over highly qualified plaintiff." Plaintiff cites evidence of his extensive education and positive performance evaluations in support of his contention that he was more qualified than Mashhurn and Harget. Plaintiff also cites evidence that defendant did not post the vacant captain positions in the manner required by the personnel rules.

Having considered plaintiff's objection and the relevant portion of the record, the court finds that plaintiff fails to present sufficient evidence of pretext to avoid summary judgment on his failure to promote to captain claim. Chief Knox identified certain attributes she sought in her managerial team, such as a willingness to work with her, which she believed plaintiff did not have and Mashburn and Harget possessed. None of the evidence cited by plaintiff rebuts this evidence head-on. See id. (the disparity in qualifications must be "so apparent as virtually to jump off the page and slap you in the face"); see also e.g. Farrance v. Montgomery County Bd. of Educ. 157 F. Supp.2d 1261, 1263-1265 (M.D. Ala 2001) (employers have the freedom to make unwise, unsound, or even irrational decisions). Therefore, plaintiff's Objection No. 3 is OVERRULED.

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Objection No. 4

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient information to create a genuine issue of material fact concerning his Title VII demotion to sergeant retaliation and discrimination claims.

Defendant moved for summary judgment on plaintiff's claims related to his demotion to sergeant arguing that plaintiff could not show that defendant's legitimate nondiscriminatory reasons for the demotion were pretextual. Defendant contends that plaintiff was denoted as part of Chief Knox's reorganization of the police department shortly after she took office. Chief Knox wanted to appoint a supervisory team of officers who were hardworking, progressive, motivated and supportive of her leadership. Knox did not believe that plaintiff was supportive of her leadership but found that he undermined her authority and challenged her decisions -

The Magistrate Judge found that plaintiff failed to show pretext. Specifically, the Magistrate Judge noted that although plaintiff asserts he was an excellent patrol captain with good job performance, plaintiff failed to present evidence which addresse Chief Knox's belief that plaintiff was not supportive of her leadership and challenged her decisions. The Magistrate Judge also found that plaintiff failed to show that any disparity in qualifications between plaintiff and the two officers promoted to captain (Ms. Pressley and Mr. Watson) or the one officer whose rank of captain was maintained was so great that no reasonable person could have taken these actions. Finally, the Magistrate Judge found that plaintiff did not provide sufficient foundation for his assertion that Ms. Pressley did not meet the minimum qualifications for a captain's position.

Plaintiff objects to these findings of the Magistrate Judge, arguing that "[n]o reasonable person would have promoted a no qualified sergeant to replace plaintiff as patrol captain. No reasonable person would believe Knox's reasons for demoting

plaint after reviewing his 2005 performance evaluation." The evidence cited by plaintiff, however, does not create an issue of fact with regard to pretext because it merely questions the wisdom of the decision but does not support a finding that the decision was based on discrimination or retaliation. See id. Therefore, plaintiff's objection No. 4 is **OVERRULED.**

Objection No. 5

The Magistrate Judge erroneously concluded that plaintiff did not produce any evidence which showed that the adverse employment action was motivated by his protected speech.

Plaintiff alleges that he was subjected to adverse action following his appearance on the "Coz" Carson radio show to discuss racial tensions within the police department and his appearance on a local television news program to discuss threats he had received because of his comments. The Magistrate Judge found that plaintiff had engaged in protected speech addressing a matter of public concern and that the plaintiff's interest in this speech outweighs the City's interest in discipline, mutual respect, trust and efficiency. The Magistrate Judge also found, however, that plaintiff failed to present sufficient admissible evidence to create a genuine issue of material fact that p speech was the motivating factor for any adverse employment decisions.

Plaintiff's objection to this finding cites numerous adverse actions taken against plaintiff. Plaintiff argues that he has sufficiently shown that his speech was a motivating factor because 1 the six officers who filed EEOC claims against Riverdale only two participated on the radio show, "defendant took action to terminate those two (including plaintiff) but promoted "two lesser qualified police officers... who filed EEOC complaints in 2004 and 2005." Having reviewed the portions of the record cited by plaintiff in his response to defendant's motion for summary judgment, the court finds that the cited evidence does not create a question of fact as to the decisionmaker's knowledge of the speech or whether it was a substantial

motivating factor in any of the alleged adverse actions. Rather, plaintiff's assertions are merely speculative and the record does not support the inferences or comparisons plaintiff attempts to make.

Therefore, plaintiff's Objection No. 5 is OVERRULED.

Objection No 6

The Magistrate Judge erroneously concluded that plaintiff did not present any evidence which showed defendants Martin, Jessie, Knox and Wallace violated his constitutional rights.

Plaintiff argues that he has presented sufficient evidence to support his due process and equal protection claims against defendants Martin, Jessie, Wallace and Knox. Plaintiff refers the court to previously cited evidence but does not address any of the Magistrate Judge's legal reasoning.

With regard to defendant Jessie, the Magistrate Judge found that plaintiff failed to show that defendant Jessie had any role in the alleged adverse employ decisions or that defendant Jessie' s alleged affirmation of Chief Knox's decisions violates the Due Process or Equal Protection clauses. The court agrees with the Magistrate Judge that plaintiff's equal protection claim is analyzed using the same elements as a Title VI claim. See Snide vs. State Community College 344 F.3d 1325, 1328 n. 4 (11th Cir. 2003). Furthermore, the court already has determined that plaintiff failed to show that the defendant's legitimate, nondiscriminatory reasons were mere pretext. Therefore, plaintiff's objection to the R & R with regard to the equal protection claim against defendant Jessie is without merit.

Likewise, plaintiff's objection with regard to his due process claim also is without merit. Plaintiff fails to point the court to any evidence that he was deprived of any liberty interest but, instead, seems to rely solely on his demotion and failure to promote to captain or assistant police chief. It is undisputed that individuals appointed to the rank of captain, major or chief "serve at the will and pleasure of the Chief of Police. . . [and has

no vested right to the position nor does he/she have a right of grievance or appeal if re-assigned to his/her former position or rank within the Department." Therefore, plaintiff had no property right in the position of captain or assistant chief of police. Accordingly, plaintiff fails to show how he was deprived of any property interest without due process. See Shelton v. City of Atlanta 796 F.2d 1391, 1392 (11th Cir. 1986); Moore v. Otero 557 F.2d 435, 437 (5th Cir. 1977).

Furthermore, with regard to plaintiff's due process and equal protection claims against defendants Martin and Wallace, these claims rest on allegations of adverse actions that predate plaintiff's execution of the Release. Therefore, the court already has determined that these claims are barred in this action.

Finally, plaintiff asserts an equal protection claim against defendant Knox based on plaintiff's demotion to sergeant and his failure to promote to captain. The court already has determined that plaintiff's Title VII claims based on the same allegations is subject to summary judgment. Therefore, plaintiff's equal protection claims also fail for the same reasons. See snider 344 F'.3d 1328 n. 4.

Objection No. 7

The Magistrate Judge erroneously concluded that the individual defendants are protected by qualified immunity.

Plaintiff argues that the individual defendants are not protected by qualified immunity because "federal laws in this circuits [sic] which prohibited employment retaliation and discrimination have long been established by the courts and lawmakers." Whether applicable law was clearly established is a "fact specific" inquiry See Rogers v. Horsely 39 F.3d 308, 311. (11th Cir. 1994). "If case law, in factual terms, has non staked out a bright line, qualified immunity almost always protects the defendant." Id.

Plaintiff fails to point the court to any factually analogous cases that would give notice that the defendants' actions clearly violated plaintiff's rights. Rather, plaintiff continues to rely "on general conclusory allegations and broad legal truisms." Without more, this court finds that the individual defendants are entitled to qualified immunity, especially in light of this court's determination that plaintiff has failed to establish any violations of Title VII.

Accordingly, plaintiff's objection No. 7 is **OVERRULED**.

Objection No. 8

Plaintiff [sic] are not entitled to sanctions because the pre-release claims were dismissed without prejudice.

Defendants Martin, Jessie, and Wallace filed a motion for sanctions pursuant to Fed. R. Civ. P. 11 against plaintiff and plaintiff's counsel. The motion included evidence that the notice required by Fed. R. Civ. P. 11(c)(1)(a) was given prior to the filing of the motion for sanctions. The Magistrate Judge recommended granting the motion for sanctions because "[p]laintiff included claims without any reasonable factual or legal basis after having time for investigation and research." The Magistrate Judge specifically note that "Plaintiff's response in opposition to the two summary judgment motions included claims that had previously been dismissed from this case in the Court's November 14, 2005 order and claims that had been waived by Plaintiff."

Plaintiff objects to the Magistrate Judge's R & R with regard to sanctions on the sole ground that "the court dismissed the pre Release claims without prejudice and plaintiff had a right to urge the court to reconsider its dismissal order during the summary judgment proceedings." Plaintiff makes no reference to defendants' argument with regard to defendants Jessie or Wallace, or the

Magistrate Judge's R & R, referencing a lack of factual or legal basis for plaintiff's claims.

While the Magistrate Judge's October 18, 2005 Non-Final R & R states that it is denying without prejudice" defendants' "motion for summary judgment" as it relates to defendants' arguments regarding the Release, the R & R also granted defendants' motion to dismiss plaintiff's first through fourth EEOC charqes for failure to receive an EEOC right to sue letter. On October 28, 2005, plaintiff filed an objection to the Magistrate Judge's R & R as to his third and fourth EEOC charges only, attaching a copy of his April 22, 2005 right to sue letter. On November 14, 2005, the court issued an order adopting the Magistrate Judge's R & R except as to the third and fourth EEOC charges. The November 14 order unequivocally dismissed plaintiff's claims related to his first and second EEOC charges (those claims that pre-date the Release). The court did not qualify the grant of defendant's motion to dismiss plaintiff's claims arising out of plaintiff's first and second EEOC charges as "without prejudice."

Plaintiff never brought any purported inconsistency with the language of the Magistrate Judge's non-final R & R to the courts attention nor did plaintiff ask for reconsideration of the court's November 14 Order. Furthermore, in continuing to assert claims that pre-dated the Release and were the subject of his second EEOC charge in plaintiff's response to defendant's motion for summary judgment, plaintiff does not acknowledge the prior dismissal of these claims or make any argument for the continued and/or renewed consideration of these claims despite their previous dismissal.

Therefore, having reviewed the arguments of the parties on defendants' motion for Rule 11 sanctions, as well as the Magistrate Judge's R & R and plaintiff's objection thereto, the court finds that sanctions are warranted under the circumstances of this case. Accordingly? plaintiff's objection No. 8 is OVERRULED.

For all the foregoing reasons, the court hereby **OVERRULES** plaintiff's objections to the R & R [docket no. 105] and **ADOPTS** the Magistrate Judge's R & R [docket no. 104] **GRANTING** defendants' motions for summary judgment [docket nos. 46, 47] and **GRANTING** defendants' motion for Rule 11 sanctions [docket no. 65] and incorporates the R & R herein as if fully set forth. Defendants Jessie, Knox, Martin and Wallace's motion for summary judgment [docket no. 16] and defendant City of Riverdale's motion for summary judgment [docket no. 47] is **GRANTED**. Defendants Jessie, Martin and Wallace's motion for Rule 11 sanctions [docket no. 65] is **GRANTED**. This matter is **REMANDED** to the Magistrate Judge for a hearing on the sanction award.

Summary

(1) Magistrate Judge's Report and Recommendation [docket no. 104] granting defendants' motions for summary judgment [docket nos. 46, 47] and defendants Jessie, Martin, and Wallace's motion for Rule 11 sanctions [docket no, 65] is **ADOPTED** and incorporated herein as if fully set forth. (2) Plaintiff's objections to the R & R [docket no. 65] are **OVERRULED**. (3) Defendants' motions for summary judgment [docket nos. 46, 47] are **GRANTED**. (4) Defendants' motion for Rule 11 sanctions [docket no. 651 is **GRANTED**. This matter is **REMANDED** to the Magistrate Judge for a hearing on the sanction award.

SO ORDERED, this 29th day of March, 2007.

G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT JUDGE

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(2)

No. 09-1082

FEB 12 2010

In The
Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE, THETUS A. KNOX, T. MICHAEL MARTIN and WANDA WALLACE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the tolling of the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv) applies when multiple motions for reconsideration are filed?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit dismissing sua sponte, for lack of jurisdiction, petitioner's notice of appeal is unreported. (Petitioner's Appendix ("Pet. App.") B). The decision of the United States Court of Appeals for the Eleventh Circuit denying petitioner's motion for reconsideration is unreported. (Pet. App. A).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on September 22, 2009. (Pet. App. A). The Eleventh Circuit then entered an order denying petitioner's motion for reconsideration on November 17, 2009. (Pet. App. A). Petitioner initially attempted to file his petition for writ of certiorari on or about November 27, 2009. The Clerk of this Court rejected the petition by letter dated January 5, 2010. Petitioner filed a petition for writ of certiorari (amended) on or about March 5, 2010. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Federal Rules of Appellate Procedure 4(a)(1)(A)

   In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

2. Federal Rules of Appellate Procedure 4(a)(4)(A)(iv)

   If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

   (iv) to alter or amend the judgment under Rule 59.

3. Federal Rules of Civil Procedure Rule 59(e)

   (e) A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

STATEMENT OF THE CASE

This case is yet another desperate attempt by petitioner's counsel to avoid payment of sanctions imposed against him for his continued abusive, frivolous and vexatious litigation tactics. The underlying

litigation commenced on July 25, 2005 when petitioner, a City of Riverdale police officer, alleged discrimination based on race and gender and retaliation for having filed charges with the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). On March 29, 2007 the district court granted summary judgment to respondents. In addition, the district court imposed sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Petitioner appealed and the United States Court of Appeals for the Eleventh Circuit upheld the grant of summary judgment on the merits but did not address the sanctions issue since a final order on the amount of sanctions had not been entered by the district court. Petitioner filed a Petition for Certiorari with this court on the underlying Title VII claim which was denied on October 6, 2008.

After two years of appeals and delays, on March 23, 2009, the district court imposed sanctions solely against petitioner's counsel in the amount of $30,955.00. Petitioner filed a motion for reconsideration on April 2, 2009 and an amended motion for reconsideration on April 3, 2009; both were denied on May 22, 2009. On June 5, 2009, petitioner filed a second motion for reconsideration and a motion to vacate the district court's May 22, 2009 denial of the reconsideration. On July 15, 2009 the district court denied petitioner's second motion for reconsideration and motion to

vacate. Petitioner filed a notice of appeal on August 12, 2009 appealing seven (7) separate orders of the district court including the determination of the amount of sanctions.

The United States Court of Appeals for the Eleventh Circuit dismissed petitioner's notice sua sponte on September 22, 2009. (Pet. App. B). The Eleventh Circuit denied petitioner's motion for reconsideration on November 17, 2009. (Pet. App. A).

ARGUMENT

Rule 4(a) of the Federal Rules of Appellate Procedure ("FRAP") provides that a notice of appeal must be filed within thirty (30) days after the judgment or order appealed from is entered. However, the timing for filing a notice of appeal is tolled when a motion to alter or amend the judgment has been timely filed under Rule 59 of the Federal Rules of Civil Procedure. FRAP 4(a)(4)(A)(iv). Nevertheless, the tolling effect of FRAP 4(a)(4)(A)(iv) does not continue in perpetuity.

Petitioner contends that his notice of appeal was timely filed despite the fact he did not file a notice of appeal following the denial of his initial motion for reconsideration entered on May 22, 2009. Petitioner's notice of appeal should have been filed within thirty (30) days of that decision, or by June 21, 2009. Petitioner's notice of appeal was not filed until August 12,

2009. Thus, the Eleventh Circuit properly dismissed petitioner's appeal.

I. Timing for Filing a Notice of Appeal is not Tolled on Successive Motions for Reconsideration

The Eleventh Circuit has correctly ruled on the issue of successive motions for reconsideration and the tolling of the time to file a notice of appeal. *Marsh v. Department of Children and Families*, 259 Fed.Appx. 201, 2007 WL 4403536 (11th Cir. 2007), citing *Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889 (11th Cir. 1990); *Stevens v. Wachovia Bank*, 2010 WL 774322 (11th Cir. 2010). In *Marsh*, the court held plaintiff's second motion for reconsideration did not toll the 30-day time limit for filing a notice of appeal. *Marsh*, 259 Fed.Appx. at 204-205. Moreover, the 30-day period began to run when the district court entered its order denying the party's first amended motion for reconsideration. *Id.* The Eleventh Circuit held "the time for appeal is postponed only by an *original* motion of the type specified. *I.e.* a motion to reconsider an order disposing of such a motion will not further postpone the time to appeal." *Id.*, citing *Wright,* 891 F.2d at 889.

Here, petitioner's amended motion for reconsideration filed April 3, 2009 was denied by the district court on May 22, 2009. As such, petitioner's notice of appeal must have been filed by June 21, 2009 to be considered timely. It was not. Despite the fact that

petitioner filed multiple motions for reconsideration, it is clear that his deadline for filing his notice of appeal was not tolled after the initial denial. As such, the Eleventh Circuit properly dismissed petitioner's appeal.

The Eleventh Circuit is not alone in its interpretation of FRAP 4(a)(4)(A)(iv) in conjunction with FRCP Rule 59. The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh and DC circuits all agree with the interpretation of the appellate rules utilized by the court in this case. *See Colon-Santiago v. Rosario*, 438 F.3d 101 (1st Cir. 2006); *U.S. v. Helmsley*, 864 F.2d 266, 268 (2nd Cir. 1988); *In re Stangel*, 68 F.3d 857, 859 (5th Cir. 1995); *Peabody Coal v. Abner*, 118 F.3d 1106 (6th Cir. 1997); *Needham v. White Labs., Inc.*, 639 F.2d 394, 397 (7th Cir.), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 237 (1981); *Stark v. Lambert*, 750 F.2d 45, 47 (8th Cir. 1984); *U.S. v. Glover*, 46 F.3d 1152 (10th Cir. 1995); *American Sec. Bank, N.A. v. John Y. Harrison Realty, Inc.*, 670 F.2d 317, 320 (D.C. Cir. 1982); *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 390 (1st Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994).

To hold that petitioner's multiple motions for reconsideration could perpetually toll the time for filing a notice of appeal would lead to the absurd result: a losing party could continue litigation indefinitely by repeatedly filing virtually identical motions for reconsideration without consequence. In that circumstance, a successful litigant, such as respondent,

would never realize its success nor be free from frivolous litigation. Indeed, respondents have defended this claim for five years and at every appellate level, yet still do not have relief from petitioner's harassing and abusive litigation tactics that warranted sanctions against petitioner's counsel in the first place.

CONCLUSION

Despite petitioner's contentions to the contrary, the Eleventh Circuit properly dismissed petitioner's notice of appeal. Petitioner failed to file the notice of appeal pursuant to the 30 day requirement of FRAP 4(a). As such, based on the foregoing, respondents respectfully pray that this Court denies petitioner's petition for a writ of certiorari.

Respectfully submitted,

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